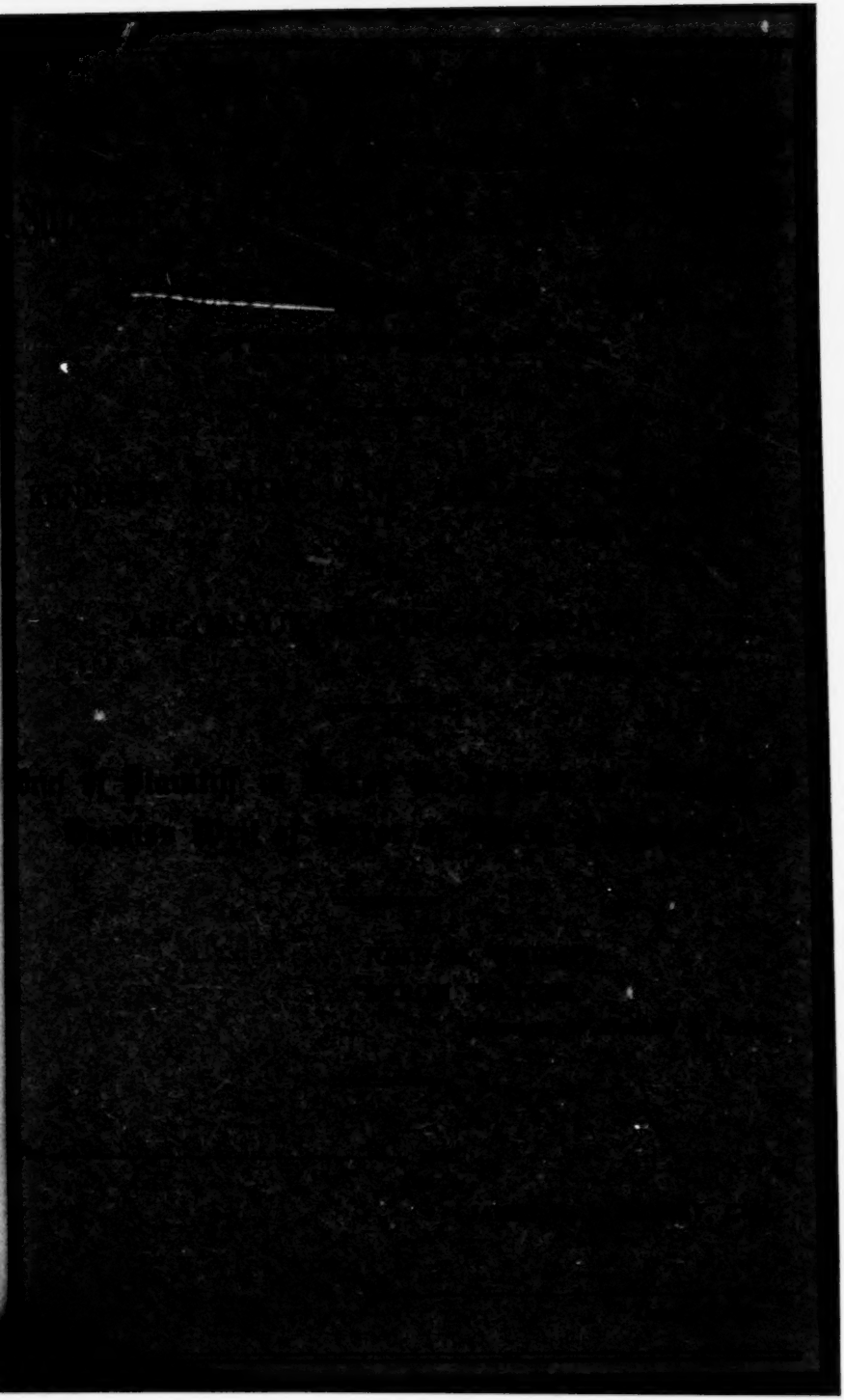

IN THE

# Supreme Court of the United States.

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KENNEDY MINING AND MILLING COMPANY,
*Plaintiff in Error,*

VS.

ARGONAUT MINING COMPANY,
*Defendant in Error.*

Brief of Plaintiff in Error in Answer to Motion to Dismiss Writ of Error or to Affirm Judgment.

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Kennedy Mining and Milling Company, plaintiff in error, answering the motion of defendant in error to dismiss writ of error or to affirm the judgment herein, respectfully shows:

That it is apparent from the record on this motion, and from the statement of facts set forth in the brief of defendant in error:

That both parties to this suit claim title to the same gold bearing vein and ore body and the proceeds of the ores extracted therefrom.

That the claim of title of plaintiff in error thereto is founded upon a patent of the United States issued to said company February 6th, 1893, under the provisions of the Act of Congress of May 10th, 1872, for the Silva Quartz Mine; See record, page 31, admitted fact XXVIII.

That the claim of title of defendant in error to the part of said vein which is in dispute, is founded upon a similar patent, issued to defendant's grantor Aug. 12th, 1872, under the same law, for the Pioneer Quartz Mine.

See Record, page 28, Fact XVI.

Both of the patents mentioned are in the usual form of pat-

ents issued by the United States for quartz claims under the said law.

That the apex of such vein is within the boundaries of said Pioneer claim as described in its patent, and the foot of the vein in its downward course, lies between the extended planes of the end lines of the Pioneer claim, and so far as the same is in dispute in this cause, lies within the vertical boundaries of such Silva claim. The relative positons of the two patented areas are correctly outlined on page 7 of the brief upon this motion, of defendant in error.

The end lines of the Pioneer Mine are not parallel to each other, but diverge in the direction of the dip of the vein. Kennedy Company has mined and extracted from said vein, within the vertical boundaries of the Silva Mine, ores of the value of $56099.95, and threatens to continue to mine the ores therefrom.

Neither party hereto makes any claim of title to the ore or the part of the vein in dispute, other than under and through such patents respectively.

Defendant in error brought this action in a superior court of the State of California to recover judgment in damages from Kennedy Company for the value of said ores extracted, and to obtain a perpetual injunction restraining said company from the commission of further trespasses upon said vein.

The pleadings put in issue the title of the parties to such ores and vein. The Superior Court of the State of California awarded to plaintiff (defendant in error) judgment as prayed for, both for damages and the injunction, and the Supreme Court of the State of California affirmed such judgment.

The case thus made is one in which the only vital question in dispute is, whether, by force of sections 2 and 3 of the Act of Congress of May 10th, 1872, entitled "An Act to promote the development of the mining resources of the United States", title to the property in suit passed to the plaintiff in error through its patent to the Silva Mine, or to defendant in error through its patent to the Pioneer Mine.

The decision of this question pivots alone upon the construction to be put upon the provisions of the Act of Congress mentioned; that is, if section 2 of the Mining Act is to be construed as requiring that the end lines of each claim (whether located before or since May 10, 1872) "shall be parallel to each other", and section 3, that the right of possession to the outside parts of veins "shall be confined to such portions thereof as lie between vertical planes drawn down as aforesaid

through the" (parallel) "end lines of their locations", then such construction would result in a judgment in favor of plaintiff in error.

On the contrary, if a proper construction of the said provisions of the Act of Congress of May 10, 1872, as to locations made prior to the passage of that act, but patented subsequent to its passage, is that such claims are not subject to such provisions and limitations as to the exercise of the extra-lateral right, and if none of the limitations of the act of May 10, 1872, or similar limitations, are applicable to such former locations notwithstanding the patent to the same was issued under the Act of May 10, 1872, such construction of the aforesaid provisions of the Act of May 10, 1872 would necessarily result in a judgment in favor of defendant in error.

This being the case made by the record, and the determination of the dispute upon the admitted facts resting solely upon the construction to be given to Acts of Congress, it conclusively follows that:

A CASE IS PRESENTED PLAINLY WITHIN THE JURISDICTION OF THIS COURT, BY WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA WHEN MEASURED BY EVERY TEST THAT HAS BEEN PRESCRIBED BY THE CONSTITUTION, BY CONGRESS AND BY THIS COURT.

This position is maintained upon the authority of the decisions of this court from the earliest period of its existence to the present time, and we confidently assert that during the whole period, there does not occur a break in the even current of judicial opinion upon the question. Without pretending to cite all of the cases in illustration of this point, we will hazard being tedious in the production of extracts from enough of the cases to show plainly that jurisdiction has here attached.

In Matthew v. Zane, 4 Cranch 382, it is said:

> Error to the state court of the state of Ohio, under the 25th section of the judiciary act, Vol. 1. p. 63.
>
> The plaintiff in error claimed title to land in the state of Ohio, under the act of Congress passed in 1800, and the decision of the state court was against him.

The defendant in error also claimed title to the same land under the same act of Congress.

The question was, whether in such a case this court had an appellate jurisdiction to revise the judgment of a state court.

Harper, for the defendant in error, contended, that the reason of bestowing upon this court the power of revising the decisions of the State courts, upon points arising under the laws of the United States, was merely to maintain the authority of the laws of the United States, against the encroachments of the State authorities. But that it was not intended to give this court the power to revise the decision of a state court, in a controversy between two of her own citizens, claiming under the same act of Congress; for whether the one or the other recovered, the authority of the laws of the United States was equally supported. The power was given merely to prevent the laws of the United States from being frittered away by state jealousies and state powers.

P. B. Key, contra, contended, that the intention was to give a uniform construction to the laws of the United States; and that whenever a state court of the highest grade shall have given a false construction to an act of Congress, to the prejudice of a right claimed under such act of Congress, this court is empowered to correct the decision; and that it is altogether immaterial whether both parties are citizens of the same state, or whether both claim under the same act of Congress.

The court at first hesitated as to the jurisdiction, but upon consultation together and deliberation,

MARSHALL, Ch. J., declared it to be the opinion of a majority of the judges, that this court has jurisdiction. That the third article of the constitution of the United States, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive.

It is supposed that the act intends to give this court the power of rendering uniform the construction of the laws of the United States, and the decisions upon rights or titles, claimed under those laws.

In Cohens v. Virginia, 6 Wheat. 379, Chief Justice Marshall uses this language:

If it be to maintain that a case arising under the con-

stitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.

In Osborn et al. v. The Bank of the United States, 9 Wheat. 821, this court has said:

We ask then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause.

In Ross vs. Doe, 1 Pet. 662, it is said:

It has been objected that this court has not jurisdiction of the case. By the second section of the third article of the constitution it is declared, "That the judicial power shall extend to all the cases arising under this Constitution, the laws of the United States, and treaties made, or to be made under their authority, etc." By the 25th section of the judiciary act of 1789, made in pursuance of this provision of the Constitution, it is enacted, "That a final judgment or decree in any suit, in the highest court of Law or Equity of a State in which a decision in the suit could be had, where is drawn in question the construction of any statute of the United States, and the decision is against the title or right, etc., specially set up or claimed by either party, etc., under such statute, etc.,

may be re-examined and reversed or affirmed by the Supreme Court of the United States upon a writ of error."

In this case the titles of both parties are derived under an Act of Congress; the construction of the statute is drawn directly in question; and the decision of the highest Court of Law of the State, is against title and right of the party, specially set up in his defense under the statute. This case is not distinguishable from the case of Matthews v. Zane (4 Cranch, 382) in which the jurisdiction of this court was maintained.

In Kissell v. The St. Louis P. S., 18 How. 19-28, this court has said:

> The conflicting titles both depend on Acts of Congress, and are submitted to this court on the whole record; and which we are called on to compare as was done in the cases of Matthews v. Zane, 4 Cranch, 382; Ross v. Barland, 1 Pet. 664; and Wilcox v. Jackson, 13 Pet., 509. This follows from the instruction given, which maintains that the title of the Board of Public Schools, under the certificate of the Surveyor-General, setting apart the land in dispute to the plaintiffs below, was superior to the defendants' title under Duncan's entry with the Register and Receiver; and that, therefore, the jury was directed to find for the plaintiff.

In Starin v. New York City, 115 U. S. 248, this court has said:

> The character of a case is determined by the questions involved. Osborn v. Bank of U. S. 9 Wheat. 824 (22 U. S. bk. 6, L. ed. 224). If from the questions it appears that some title, right, privilege or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise, not. Such is the effect of the decisions on this subject. Cohens v. Virginia, 6 Wheat. 279 (19 U. S. bk. 5, L. ed. 284); Osborn v. Bank of United States, 9 Wheat. 824 (22 U. S. bk. 6, L. ed. 224); The Mayor v. Cooper, 6 Wall. 252 (73 U. S. bk. 18, L. ed. 852); Gold Washing & Water Co. v. Keyes, 96 U. S. 201 (Bk. 24, L. ed. 658); Tennessee v. Davis, 100 U. S. 264 (Bk. 25, L. ed.

650); Railroad Co. v. Mississippi, 102 U. S. 140 (Bk. 26, L. ed. 98); Ames v. Kansas, 111 U. S. 462 (Bk. 28, L. ed. 487); Kansas Pacific v. Atchison R. R. Co., 112 U. S. 416) (Bk. 28, L. ed. 795); Provident Savings Soc. v. Ford, 114 U. S. 641 (Bk. 29, L. ed. 261); U. Pacific R. R. Removal Cases, 115 U. S. 11 (Bk. 29, L. ed. 319).

And finally the principle is recognized in DeLamar's Nevada Gold Mining Co. v. Nesbitt, 177 U. S. 528, in this language:

> To raise a Federal question the right must be one claimed under a particular statute of the United States, the validity, *construction* or *applicability* of which was made the subject of dispute in the state court; and the decision upon such statute *must have been adverse to the plaintiff in error.*

The respective decisions of the trial and appellate court of the State of California rendered in this cause furnish an apt illustration of the possible divergency of construction of the Act of Congress of May 10th, 1872, to correct which contrariety of view, federal jurisdiction exists.

The Superior Court at the trial adjudged that the Argonaut Company "was the owner of all that portion of the Pioneer or Argonaut vein lying between vertical planes drawn downward through the *end lines* of said Pioneer or Argonaut mine lot No. 48, and said end lines produced in their own direction indefinitely eastwardly, and at all times mentioned in the complaint in this action said plaintiff had, and now has a right to pursue and follow said vein on its downward course to any depth underneath the surface of the Silva quartz mine owned by defendant, *within said vertical planes*, although in its downward course said vein passes out of and beyond a vertical plane drawn downward through the east side line of said Pioneer or Argonaut mine."

See Assignment of Error XXI., Record p. 101.
See corresponding Exception, No 21, Record p. 71.

While this construction of the Act of May 10th, 1872, is claimed on behalf of plaintiff in error to be erroneous, yet it has the merit of following the philosophical reasoning and theory of Lindley on Mines (Sec. 577) even if it does permit an owner of a claim which has divergent end lines to "defeat the limitation of quantity on a ledge, which was the most important provision in the whole system of rules." (Mr. Justice Field in Eureka case, 4 Sawyer, 322.)

The Supreme Court of the State of California, upon appeal, having before it the question upon its broadest merits as shown by the record, here construed the Act of Congress of May 10th, 1872, as follows:

> I think the law of 1872, instead of extending the rights of locators under the law of 1866 along the lode, expressly limits them in that respect to the rights they had under the previous laws. Section 2 provides: "Mining claims upon veins or lodes * * * heretofore located shall be governed, as to length on the vein or lode, by the customs, regulations and laws in force at the date of their location."
>
> These words themselves, in my opinion, are sufficient to support the declaration of the court in the Eureka case. Speaking of the limitations provided in Section 3 of the Act of 1872, which I have noticed, of lodes to planes through the end lines, "The act in terms annexes these conditions to the possession not only of claims subsequently located, but to the possession of those previously located. This fact, taken in connection with the reservation of all rights acquired under the Act of 1866, indicates that in the opinion of the legislature no change was made in the rights of the previous locators by confining their claims within the end lines. The act simply recognized a pre-existing rule applied by miners to a single vein or lode of the locator, and made it applicable to all veins or lodes found within the surface lines."
>
> This proposition is substantially reiterated in Iron Silver Mine v. Elgin, 118 U. S., 194, and in many other cases including the latest to which our attention has been called —Walrath vs. Champion, 171 U. S., 293.
>
> It remains but to add on this point that the patent under which plaintiff claims only grants of the discovery lode fifteen hundred and eighty-nine and 94/100 linear feet "of the said Pioneer quartz vein, lode, ledge or deposit, as hereinbefore described, throughout its entire depth * * * Provided that the right of possession to such outside parts of said veins, lodes, ledges or deposits shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction," etc. And in the habendum is added as a condition, "that the grant hereby made is restricted

to the land hereinbefore described as Lot No. forty-eight (48), with fifteen hundred and eighty-nine and 94/100 linear feet of the Pioneer quartz vein, lode, ledge or deposit throughout its entire depth," etc.

I think it clear that there is no attempt here to convey all within planes passing through the end lines, if such planes would at any depth include more than the amount specifically defined on the strike of the lode.

Upon this conclusion, that a patent to a location with end lines diverging in the direction of the strike* does not convey all within those planes, but at the most not more than the stated number of feet on the lode, at any given depth, the appellant contends that such patent grants no extra-lateral rights at all. Such would be the law if the location were under the law of 1872, and as the patent to the Pioneer was issued after that law took effect, counsel contends that it is subject to its requirement that the end lines must be parallel or the patentee has no extra-lateral rights.

It is too plain for argument that the record upon this motion shows a case involving a federal question.

THERE IS NO MERIT IN THE CONTENTION OF DEFENDANT IN ERROR THAT PLAINTIFF HAS NOT PROPERLY RAISED A FEDERAL QUESTION IN THE RECORD.

There are two complete answers to such contention.

1. WHERE, AS IN THIS CASE, THE QUESTION NECESSARILY INVOLVED IS ONE OF THE CONSTRUCTION TO BE PLACED UPON A STATUTE OF THE UNITED STATES, NO NECESSITY EXISTS THAT SUCH FEDERAL QUESTION SHOULD BE AFFIRMATIVELY SET OUT AS SUCH UPON THE RECORD.

In the case of Kaukauna W. Co. vs. Green Bay Co., 142 U. S. (U. S. Book 35, p. 1009), it is held:

"This court has had frequent occasion to hold, that it is not always necessary that the federal question shoul ap-

*The word "strike" was used here inadvertently. The word dip was intended.

pear affirmatively on the record or in the opinion, if an adjudication of such question were necessarily involved in the disposition of the case of the state court."

In Columbia W. P. Co. vs. Columbia Electric Co., 172 U. S. 488, this court held:

> But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here.

Even if plaintiff in error had been without title in the Silva ground, and judgment as in this cause had gone against it, yet the case would have presented a federal question, although it had not specially set up or claimed, any right or title under any act of Congress, for the right of recovery would necessarily depend upon the construction of an act of Congress.

Starin vs. N. Y. City, cited above.

2. THE FEDERAL QUESTIONS INVOLVED WERE SUPERABUNDANTLY SET UP AND CLAIMED IN BOTH THE SUPERIOR AND SUPREME COURTS OF THE STATE OF CALIFORNIA, AT THE PROPER TIMES AND IN THE PROPER MANNER.

In the stipulation agreeing upon a statement of the facts in this case, it was provided that each or either party may serve on the opposite party and file in this cause within twenty days from this date, a statement in writing setting forth specifically its objections to each fact the admission of which is objected to by it for want of relevancy and materiality to and competency to prove the issues presented by the pleadings or for want of relevancy or materiality to or competency to prove such issues, and such written statement of objections shall be deemed and taken as part of the record of the cause and the objections therein stated shall be ruled on by the Court the same as though made in open Court or as though specifically set forth in this stipulation.

And in accordance with this right reserved, plaintiff in error at the trial made its objections to certain of said agreed facts and to the competency and legal effect thereof as follows:

DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

*Twenty-first.* All and singular each and every the facts set forth in paragraph XVI of said agreed statement, showing among other matters and things, that on August 12, 1872, the U.S.Government issued to said Pioneer Gold and Silver Mining Company certain letters patent conveying or purporting to convey to said Pioneer Gold and Silver Mining Company the Pioneer Quartz Mine, Lot No. 48, as the same is described in said letters patent, a copy of which is set forth in *haec verba* in said paragraph XVI, and defendant specially objects to the admission as evidence herein of said letters patent and all and singular each and every the facts, matters and things therein recited;

*Twenty-second.* All and singular each and every the facts set forth in paragraph XXVI of said agreed statement showing that said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to plaintiff on July 3, 1893, and that plaintiff ever since has been and now is the owner thereof.

Defendant bases its aforesaid objections to the admission as evidence herein, of the facts set forth in said paragraphs XVI and XXVI of said agreed statement, as well as its aforesaid objections to the admission as evidence herein of the aforesaid letters patent to said Pioneer Quartz Mine and the facts matters and things therein recited, upon the following grounds to-wit:

*(a)* All and singular each and every the fact so objected to including all and singular each and every the said patent to said Pioneer Quartz Mine, Lot No. 48, and the facts, matters and things therein recited and set forth, are immaterial and irrelevant to all and singular each and every the issues in this cause, and are incompetent as evidence to prove the issues herein or any of them and are incompetent as evidence to prove title or right in plaintiff to the ores in dispute in this cause, because: ALTHOUGH IT IS TRUE that the ores in dispute herein were all extracted by defendant from the vein mentioned in the complaint herein and in said agreed statement and in said Pioneer patent as the "Pioneer Vein," and that the

apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 through said lot north nineteen (19) degrees and fourteen (14) minutes west to the center of the north end line thereof, and that all of said disputed ores were extracted by defendant from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraph XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said disputed ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that, as shown by said Pioneer patent and by the complaint herein and by reference to said "Exhibit A," the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west and easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being North Eighty-nine (89) degrees and thirty-six (36) minutes east and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said vertical east side line thereof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted from said vein the ores in dispute herein, all of which points are within the vertical boundaries of defendants Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by

said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the Development of the Mining Resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz Mine, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot No. 48 should or could attach to said Lot No. 48 and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of said Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein lying outside the vertical boundaries of said Lot. No. 48, AND THEREFORE, the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; and

*(b)* All the ores in dispute in this cause were extracted by defendant from said Pioneer vein at points within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, and distant more than 900 feet from the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said Lot No. 48 and in the direction of said divergence to points distant more than nine hundred feet from said Lot No. 48,—

THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled " An Act to promote the development of the Mining Resources of the United States " under which said Pioneer patent was issued and especially because of the provisions of sections two (2) and three (3) of said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of any part of said Pioneer vein which lies outside of the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, as described in said United States patent therefor, and are not now and never have been the owners of or entitled to the possession of the ores in dispute in this cause or any thereof; and

*(c)* All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

*(d)* The grant or attempted grant of an extra-lateral right in and by said Pioneer patent is indefinite and uncertain in this said patent purports to grant only 1589 94-100 linear feet of said Pioneer vein throughout its entire depth, and by the conditions of said patent the interest in said Pioneer vein thereby granted or attempted to be granted, is specifically restricted to 1589 94-100 linear feet thereof, but it cannot be ascertained from said Pioneer patent what particular segment of 1589 94-100 linear feet of said Pioneer vein is intended to be granted thereby, nor can it be ascertained from said Pioneer patent whether it is intended thereby to grant that certain segment of 1589 94-100 linear feet of said Pioneer vein lying parallel to and next northerly from the south end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant that certain segment of 1589 94-100 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Pioneer Quartz Mine extended in its own course easterly, or whether it is intended by said Pioneer patent to grant a segment of 1589 94-100 linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that, even though the grant of 1589 94-100 linear feet of said Pioneer vein

mentioned in said Pioneer patent were valid, it cannot be ascertained in any way or manner from said Pioneer patent whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein intended to be conveyed by said patent to the Pioneer Gold and Silver Mining Company; and

*(c)* If said Pioneer patent can be construed as defining and conveying any interest at all in any part of said Pioneer vein lying outside of said Lot No. 48, such interest so defined and conveyed must be either (1) that certain segment of 1589 94-100 linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said Pioneer patent and by the complaint herein, said south end line of said Lot No. 48, constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line of said Lot No. 48, to-wit, from the north end of said vein parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48, which is definable by reference to the boundaries of said Lot No. 48, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment conveyed by means of said Pioneer patent.

AND DEFENDANT IN LIKE MANNER OBJECTS TO THE ADMISSION AS EVIDENCE HEREIN OF THE FOLLOWING ADDITIONAL FACTS, to-wit:

*Twenty-third.* All and singular each and every the facts set forth in paragraph XXIII of said agreed statement, showing among other matters and things, that defendant has extended its 1450, 1550, 1650 and 1750 levels south of a vertical plane drawn down through the north end line of said Lot No. 48 extended indefinitely in its own direction North seventy-four (74) degrees and fifty-one (51) minutes East, and that between Oc-

tober 8, 1895, and December 12, 1895, this defendant extracted 2,604 tons of ore from said Pioneer vein southerly from said vertical plane but within the vertical boundaries of said Silva Quartz Mine, and that the gross value of said 2,604 tons of ore was $62,218.45 and that the aggregate cost of mining and milling said 2,604 tons of ore was $6,119.40, and that the net profit realized by defendant from said 2,604 tons of ore was $56,099.95;

*Twenty-fourth.* All and singular each and every the facts set forth in paragraph XXIV of said agreed statement, in so far as such facts show or tend to show that the aforesaid 2,604 tons of ore were extracted from said Pioneer vein south of said vertical plane drawn down through the line named in said paragraph XXIV as the line A—B—B'.

Defendant bases its aforesaid objections to the admission as evidence herein of such facts set forth in said paragraphs XXIII and XXIV of said agreed statement, upon the following grounds, to-wit:

*(a)* All and singular each and every the facts so objected to are immaterial and irrelevant to all and singular each and every the issues in this cause and are incompetent as evidence to prove the issues herein or any of them, because: ALTHOUGH IT IS TRUE that all of said ores were extracted by defendant from the vein mentioned in said Pioneer patent and in the complaint herein and in said agreed statement as the Pioneer vein, and that the apex of said Pioneer vein extends from the center of the south end line of said Lot No. 48 throughout the entire length of said Lot and midway between the side lines thereof to the center of the north end line thereof, and that all of said ores were extracted by defendant from points between vertical planes drawn down through the end lines of said Lot No. 48 indefinitely extended in their own directions respectively,—IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XXIII of said agreed statement and by reference to "Exhibit A" referred to in said paragraph XXIII and attached to said agreed statement, all of said ores were extracted by defendant from points on the dip of said vein more than 1300 feet vertically below the surface of the earth and outside of and distant more than 900 feet easterly from the vertical boundaries of said Lot No. 48, to-wit, more than 900 feet easterly from a vertical plane drawn down through the easterly side line of said Lot No. 48, AND IT IS ALSO TRUE that as shown by said Pioneer patent and by the complaint herein and by reference to said "Exhibit A,"

the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, but, on the contrary, the northern end line thereof in its course from its west end easterly diverges and departs substantially and at a very large angle toward the north from a line parallel to the southern end line thereof, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, the course of said southern end line from its west end easterly being north eighty-nine (89) degrees and thirty-six (36) minutes east, and the course of said northern end line from its west end easterly being north seventy-four (74) degrees and fifty-one (51) minutes east, AND IT IS ALSO TRUE that, as shown by the facts set forth in paragraphs XX, XXII, XXIII, XXIV and XXV of said agreed statement, said Pioneer Vein dips and extends downward into the earth at such an angle from the plane of the horizon and in such a manner as to pass from and extend out of said Pioneer Quartz Mine easterly through and beyond the vertical east side line thereof into ground lying easterly from said Lot No. 48 and from said east vertical side line therof and so onward continuously in the direction of the aforesaid divergence between said end lines of said Lot No. 48 to the points above described where defendant extracted said ores from said vein, all of which points are within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, AND IT IS ALSO TRUE that, as shown by reference to said paragraph XXIII and to said " Exhibit A," all of said ores were extracted outside of and far easterly from said Lot No. 48 and at points where vertical planes drawn down through the end lines of said Lot No. 48 extended in their own directions respectively, are distant from each other more than 1900 feet, AND IT IS ALSO TRUE, that, as shown by said Pioneer patent, the same was issued on the twelfth day of August, 1872, under the provisions of that certain act of the Congress of the United States approved May 10, 1872, entitled " An Act to promote the development of the mining resources of the United States," and more than three months after said Act of Congress became a law, AND IT IS ALSO TRUE that, under the provisions of said Act of Congress and particularly under the provisions of sections two (2) and three (3) thereof, it was at the time of the issuance of said Pioneer patent, ever since has been and now is, necessary that the end lines of said Pioneer Quartz Mine, Lot No. 48, should be parallel to each other in order that any extra-lateral right or any right to or interest in any part of said Pioneer vein lying

outside the vertical boundaries of said Lot No. 48, should or could attach to said Pioneer Quartz Mine, and be enjoyed by the owners thereof; AND THEREFORE and because the end lines of said Pioneer Quartz Mine are not parallel to each other but diverge and depart from each other in the direction of the dip of the Pioneer vein and in the manner aforesaid, it was not competent to the officers of the Land Department of the United States to make a grant in connection with the grant of said Pioneer Quartz Mine, Lot No. 48, of any extra-lateral right or any right to or interest in any part of said Pioneer vein, lying outside the vertical boundaries of said Lot No. 48, AND THEREFORE the act of the officers of the Land Department of the United States in granting or attempting to grant an extra-lateral right in and by means of said Pioneer patent, was and is against law and was and is absolutely void; AND THEREFORE said ores did not pass to the Pioneer Gold and Silver Mining Company by means of said Pioneer patent, AND THEREFORE did not pass to plaintiff herein by means of the deed whereby said Pioneer Gold and Silver Mining Company conveyed said Pioneer Quartz Mine to said plaintiff; and

*(b)* All of said 2,604 tons of ore were extracted by defendant from the vein of which said Pioneer vein forms a part at points distant more than 900 feet from said Lot No. 48 and within the vertical boundaries of defendant's Silva Quartz Mine, Lot No. 86, which was granted to this defendant on the sixth day of February, 1893, by letters patent of the United States issued in pursuance of the provisions of Chapter Six of Title Thirty-two of the Revised Statutes of the United States, and legislation supplemental thereto, and DEFENDANT SPECIALLY SETS UP AND CLAIMS that under the aforesaid statutes and legislation of the United States, this defendant at all the times mentioned in said complaint has had and now has against all the world the exclusive title and right to all and singular each and every the aforesaid 2,604 tons of ore and to all and singular each and every the substance contained within the vertical boundaries of said Lot No. 86, and DEFENDANT further under said statutes and legislation of the United States, SPECIALLY SETS UP AND CLAIMS immunity from any and all claims of said plaintiff to said 2,604 tons of ore or any thereof and from any and all claims of said plaintiff to the substance contained within the vertical boundaries of said Lot No. 86 or any thereof and DEFENDANT FURTHER SPECIALLY SETS UP AND CLAIMS immunity from and against the claims of plaintiff to said 2,604 tons of

ore and to the substance contained within the vertical boundaries of said Lot No. 86, because of the fact that, as shown by said Pioneer patent, the end lines of said Pioneer Quartz Mine, Lot No. 48, are not parallel to each other, and because of the further fact that said end lines diverge and depart from each other in the direction of the dip of said Pioneer vein, such divergence and departure being to the extent of fourteen (14) degrees and forty-five (45) minutes, so that in order to reach said points where said ores were extracted, it is necessary to follow said Pioneer vein on its dip away from said Lot No. 48 and in the direction of said divergence to points distant more than 900 feet from said Lot No. 48. THEREFORE and because of the provisions of the Act of the Congress of the United States, approved May 10, 1872, entitled " An Act to promote the development of the Mining Resources of the United States," under which the U. S. patent to said Lot No. 48 was issued, and especially because of the provisions of sections two (2) and three (3) of said Act, the owners of said Pioneer Quartz Mine, Lot No. 48, are not now and never have been the owners of or entitled to the possession of said 2,604 tons of ore or any thereof, and are not now and never have been the owners of or entitled to the possession of the substance contained within the vertical boundaries of said Lot No. 86, or any thereof; and

*(c)* All the ores in dispute herein were extracted by defendant from points without the vertical boundaries of said Pioneer Quartz Mine, Lot No. 48, and by reason of the surface form or shape of said Pioneer Quartz Mine, Lot No. 48, its owners never have had and have not now any right under any law of the United States or under any law to follow said Pioneer vein in its downward course beyond the lines of said Pioneer Quartz Mine, Lot No. 48; and

*(d)* The averment in the complaint herein of an extra-lateral right is indefinite and uncertain in this, said complaint alleges the ownership of plaintiff in and to 1589 94-100 linear feet of said Pioneer Vein with the exclusive right to said 1589 94-100 linear feet of said vein throughout its entire depth although it may enter the land adjoining, but it is not alleged in said complaint that plaintiff has or ever had any interest in said Pioneer vein excepting said 1589 94-100 linear feet thereof throughout their entire depth as aforesaid, and it cannot be ascertained from said complaint what particular 1589 94-100 linear feet of said Pioneer vein is intended to be claimed by plaintiff, nor can it be ascertained from said complaint whether it is the intention of plaintiff to claim that certain segment of

1589 94-100 linear feet of said Pioneer vein lying parallel with and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim that certain segment of 1589 94-100 linear feet of said Pioneer vein lying parallel to and next southerly from the north end line of said Lot No. 48 extended in its own course easterly, or whether it is intended by said complaint to claim a segment of 1589 94-100 linear feet of said Pioneer vein midway between said end lines of said Pioneer Quartz Mine indefinitely extended in their own directions respectively, so that it cannot be ascertained in any way or manner from said complaint whether or not the ores in dispute in this cause ever formed part of that particular segment of the Pioneer vein claimed by plaintiff in its said complaint; and

*(e)* If said complaint can be construed as defining any claim at all of plaintiff to any part of said Pioneer vein lying outside of said Lot No. 48, such part so defined must be either (1) that certain segment of 1589 94-100 linear feet of said vein lying parallel to and next northerly from the south end line of said Lot No. 48 extended in its own course easterly, because, as is shown by said complaint, said south end line of said Lot No. 48 constitutes the base line and initial boundary thereof, from which all its other boundaries must be measured, or (2) that certain triangular segment of said vein having for ITS NORTH BOUNDARY, a line drawn from the center of the north end line of said Lot No. 48, to-wit, from the north end of said vein, parallel to the south end line of said Lot No. 48 extended in its own course North eighty-nine (89) degrees and thirty-six (36) minutes east, and FOR ITS SOUTH BOUNDARY, a line drawn from the center of the south end line of said Lot No. 48, to-wit, from the south end of said vein, parallel to the north end line of said Lot No. 48 extended in its own course North seventy-four (74) degrees and fifty-one (51) minutes east, because said triangular segment of said vein includes the only portion of said vein outside of said Lot No. 48 which is definable by reference to the boundaries of said Lot No. 48 as set out in said complaint, so that in no case can it be shown that the disputed ores ever constituted part of any vein segment described in said complaint.

And THIS DEFENDANT SPECIALLY SETS UP AND CLAIMS that, in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by plaintiff to the ores in question by reason of its ownership of the Pioneer

Quartz Mine, Lot No. 48, as well as in the decision of all and singular each and every the questions raised by those of the foregoing objections which relate to the right and title asserted by defendant to said ores by reason of its ownership of the Silva Quartz Mine, Lot No. 86, is involved: First, the construction of the Act of the Congress of the United States approved May 10, 1872, entitled "An Act to promote the development of the Mining Resources of the United States," under the provisions of which plaintiff acquired its title to said Lot No. 48; and, second, the construction of Chapter Six of Title Thirty-two of the Revised Statutes of the United States and legislation supplemental thereto, under the provisions of which defendant acquired its title to said Lot No. 86.

And all and singular each and every of such objections are so SPECIALLY SET UP AND CLAIMED BY DEFENDANT so as to apprise the court that the Federal Questions so involved are presented for its consideration and decision.

These several objections were set up and claimed by plaintiff in error at the trial, and were overruled by the court as appears in the bill of exceptions contained in the record.

See Objections in Bill of Exceptions, Record p. 46 to 54.
" Ruling on Objections, Bill of Exceptions, " " 62 " 70.
" Assignments of Error " " 92 " 101.

The questions and principles of law involved in such objections, inhered in the decision and judgment of the trial court, and corresponding exceptions were taken by plaintiff in error to the various parts of such decision and judgment, and are included in the bill of exceptions and assignment of error herein.

See Bill of Exceptions, Record pp. 70 to 72.
" Assignment of Error, " " 101 " 103.

Counsel for defendant in error unfortunately relies upon the case of *Dower vs. Richards, 151, U. S. 658-667*, for the position that "the reception by the trial court of immaterial and incompetent evidence in no sense involves a federal question of which this court will take cognizance."

Brief of defendant in error, p. 12.

Reading the quotation from that case, as it appears in their brief, one gets the idea that this court used the quoted language as a substantive proposition; but an inspection of the report clearly indicates that in order to get the quotation, it

was necessary to cut a sentence into two parts, use the part which suited the purpose and omit that which controlled the sense. The paragraph of the report reads as follows :

> When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron:
>
> " The powers of the Supreme Court are limited in cases coming up from the state courts, under the 25th section of the Judiciary Act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of Congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction."
>
> *Dower* vs. *Richards*, 151 U. S. 667.

It is quite apparent that the authority cited ranges upon the side of the question favorable to the jurisdiction in this case.

As that case was cited "parenthetically" in terms, it may not be out of place to likewise here apologize for "taking it away," and using it adversely.

It is claimed by defendant in error that " the Supreme Court of California not only declined to give effect to the evidence considered by the trial court over the Kennedy Company's objection, but held tentatively that the facts objected to were not material."

Brief of Defendant in Error, p. 12-13.

If the case presented by the record shows one of jurisdiction here, the ruling of a state court even to the contrary would avail nothing.

The Supreme Court of California did not say that those objections which related to the Federal questions involved were based on the ground of immateriality or so treated by it,—but quite to the contrary, it said:

> "The question of law upon which the case must turn is not changed or affected by receiving this immaterial evidence."

Inasmuch as objections numbered 21 to 24 inclusive were not treated by the Supreme Court of California as being immaterial, nor so claimed by defendant in error to have been treated by that court, it is hardly fair to say, as is done on behalf of defendant in error,—"That this class of objections and "rulings to which is appended the assertion of Federal Ques- "tion heretofore quoted are entirely eliminated from the case "by the action of the Supreme Court of California."

See page 13 of Brief of Defendant in Error.

It is claimed that plaintiff in error should have predicated the federal questions raised in the State Court upon the Act of Congress of July 26, 1866, rather than as arising upon the Act of May 10, 1872.

Without conceding that in this case it was necessary to specially set up and claim a title, right or immunity under any law of Congress, for the reasons hereinbefore given, it is insisted that it was entirely proper for plaintiff in error to refer to the last-named act of May 10, 1872, and not to the former of July 26, 1866.

Both patents under which the titles of the respective parties have vested were issued after May 10, 1872, and under the provisions of the Act of that date.

By the expressed terms of the 9th section of the Act of May 10, 1872, the first, second, third, fourth and sixth sections of the Act of July 26, 1866, *were repealed*.

The repeal is unlimited and unqualified as such, and the mere saving clause, "but such repeal shall not affect existing rights," does not detract from the repeal which was complete.

In the maintenance of jurisdiction in this case, it is sufficient to say that the two patents in conflict are issued under the law of 1872, and that the claim specially set up in the State Court properly referred to that law.

The fact that one of the patentees can possibly invoke also the protection of rights which accrued under the prior law, does not necessarily imply that such prior law is yet in force.

WHENEVER THE ACT OF MAY 10, 1872, MODIFIES OR CONFLICTS WITH THE ACT OF JULY 26, 1866, IN ITS APPLICATION TO CLAIMS LOCATED BEFORE THE PASSAGE OF THE ACT OF 1872, EVEN THOUGH SUCH CLAIMS MAY HAVE PASSED ENTRY, THE LAW OF 1872 MUST PREVAIL.

The Bill of Exceptions in the Eureka Case, 4 Sawy. 302, shows that a series of propositions were specifically presented to and ruled on by the Court. The third and fourth of these propositions and rulings were as follows:

3D EUREKA PROPOSITION.

"3d. Claimants on mining lands under the said Act of "July 26, 1866, who had, prior to the 10th day of May, "1872, complied with the terms of said first named act, "and to which there was no adverse claim, were entitled "to enter such land and receive a patent therefor, granting "such mine, together with the right to follow such lode or "vein therein with its dips, angles and variations al- "though it might enter the land adjoining, together with "a reasonable quantity of surface for the convenient "working of the same as fixed by local rules."

RULING.

"3d. The third proposition is sustained, the words '*to* "*any depth*' being inserted."

4TH EUREKA PROPOSITION.

"4th. The rights and interests of claimants as referred "to in the last preceding proposition were not impaired "or affected in any way by the Act of May 10, 1872, above "referred to."

RULING.

"4th. The fourth proposition is sutained, the words '*ex-* "*cept as specified in the Act of 1872*' being added at the end."

And see:

Lakin v. Dolly, 53 Fed. 333;
Lakin v. Roberts, 54 Fed. 461;
Lakin v. Roberts, 154 U. S. 507;
Carson City v. North Star, 73 Fed. 597;
Carson City v. North Star, 83 Fed. 662;
Michigan v. Rust, 168 U. S. 589;
Del Monte v. Last Chance, 171 U. S. 55;
Brown v. Hitchcock, 173 U. S. 473;
Botillier v. Dominguez, 136 U. S. 238.

In Del Monte v. Last Chance, *supra*, it is said in reference to the Act of 1866, "Nowhere was there any express limitation as to the amount of land to be conveyed."

But Lakin v. Dolly, *supra*, was where patent for a mine was applied for in 1867 and the patent was issued in 1877. The surface patented was in excess of 300 feet on one side of the lode. The Court held that the provisions of Section 2320 R. S. of U. S. relating to the width of claims were universal in their application and declared void the excess above 300 feet.

In the same portion of said Section 2320 appears the provision, "the end lines of each claim shall be parallel to each other."

Lakin v. Dolly was reviewed by the Court of Appeals in Lakin v. Roberts, 54 Fed. 461. Here the Court say:

> "It is not contended that plaintiff's interests were so far "vested that by that act" (the Act of May 10, 1872) "Congress had no power to limit or vary them. We shall "assume, therefore, that *Congress had this power, and, hav-* "*ing it, we think it exercised it in the provisions we have quoted.* "The language of the section of the Revised Statutes must "be confined to preserving the application, and of *all rights* "*except the size of the claim, length and width of it.*
>
> "All the provisions of the statute would not otherwise "be given effect. The Land Department, therefore, had "no power to issue a patent for a greater width of land "than 300 feet, and the patent in this case in excess "of 300 feet is void. Doolan v. Carr, 125 U. S. 624; 8 Sup. "Ct. Rep. 1228, and the other decisions cited in the opin- "ion of the learned judge who tried the case in the Cir- "cuit Court."

An application for a review of the two cases last named, by

writ of error or by writ of certiorari, was made to the U. S. Supreme Court, *but both writs were refused.*

Lakin v. Roberts, 154 U. S. 507.

In Carson City v. North Star, 83 Fed. 662, the Court of Appeals reviewed the Lakin cases and declared that the decision therein rendered was based on Section 2320, Rev. Stats. of U. S.

In Carson City v. North Star, 73 Fed. 597, after in effect defining the end line rule under the law of 1866 to be as adopted in the Eureka Case, 4 Sawy. 302, the Court says:

> "Although Section 9 of the Act of 1872, in repealing "certain parts of the old law, provided that 'such appeal "'shall not affect existing rights,' *the courts have held that, "when any claim is patented, those rights are controlled by the "patented lines."*

In Del Monte v. Last Chance, *supra*, it is said:

> "By Section 2319, quoted above, the mineral deposits "which are declared to be open to exploration and pur- "chase, are those found in lands belonging to the United "States, and such lands are the only ones open to occupa- "tion and purchase.
>
> *"While this is true, it is also true that until the legal title "has passed, the public lands are within the jurisdiction of the "land department, and, although equitable rights may be estab- "lished, Congress retains a certain measure of control. Mich- "igan Land & Lumber Company vs. Rust, 168 U. S. 589. "The grant is, as is often said, in process of administration.*
>
> "Passing to Section 2320, beyond the recognition of the "governing force of customs and regulations and a dec- "laration as to the extreme length and width of a mining "claim, *it is provided that 'no location of a mining claim "'shall be made until the discovery of the vein or lode within "'the limits of the claim located. * * * The end lines "'of each claim shall be parallel to each other.'*"

All these decisions cited appear to harmonize with that of Lakin v. Roberts, 54 Fed. 461, wherein Judge McKenna, speaking for the U. S. Court of Appeals, says in effect that those sections of the Act of 1872 providing for the preservation of existing rights, *must be read together with those provisions of the same statute concerning the length and width of claims.* The Court's language is:

> "The language of the section of the Revised Statutes "must be confined to preserving the application and of all

"rights except the size of the claim, length and width of it. "*All the provisions of the statute would not otherwise be given* "*effect.*"

From these considerations it is made plain that in specially setting up and claiming the federal question in the state court, plaintiff in error was correct in referring to the Act of Congress of May 10, 1872, instead of the repealed act of July 26, 1866.

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THAT THE MOTION OF DEFENDANT IN ERROR TO AFFIRM THE JUDGMENT OF THE STATE COURT SHOULD BE DENIED IS EQUALLY PLAIN.

UNDER THE ESTABLISHED PRACTICE OF THIS COURT, THERE IS AMPLE "COLOR" IN SUPPORT OF OUR CLAIM OF THE EXISTENCE OF A FEDERAL QUESTION WHICH WARRANTS CONSIDERATION UPON THE MERITS AFTER A HEARING IN REGULAR ORDER.

Millingar vs. Hartupee, 73 U. S. 258 (18-829);
City of New Orleans vs. Water Works, 142 U. S. 79-93;
Hamblin vs. Western Land Co., 147 U. S. 532;
Douglass vs. Wallace, 161 U. S. 348.

Upon the merits of the federal question claimed, plaintiff in error is not only prepared to show "color" or probable cause, warranting the hearing upon the merits of the writ of error herein, but as well to show that upon the hearing the judgment of the Supreme Court of the State of California should be reversed.

While candor compels counsel for plaintiff in error to say that there has been no decision of this court directly holding that the requisite of parallelism of end lines of a location entered under the Act of 1866 and patented under the Act of 1872, exists as essential to support the extra-lateral right, yet it is confidently asserted that such is the only logical and correct conclusion to be arrived at from the application of the germane principles of the decisions of this court rendered since the decision of the Eureka case, the effect of which decisions we claim to be, that the Eureka case cannot now, even if it ever could in the past, be considered as authority decisive of the law of the question here involved.

In the case of Richmond Mining Co. vs. Eureka Mining Co. (103 U. S. 839) commonly called the Eureka case, the decision of this court was mainly based on the estoppel of the agreement between the parties. After treating of such agreement, this court says:

> "*This disposes of the case.* The Richmond Company is "in no condition to dispute the validity of the Eureka's "patents for the At Last and the Margaret, because the "end lines of the survey are not parallel, as it has agreed "with the Eureka for a consideration, not to work in the "limestone to the south and east of the compromise line."

Next follows the expression, "*upon the face of the patents* the United States has granted to the Eureka the right to all veins, etc.," relied upon by defendant in error.

The only other statement of the rule that parallelism of end lines was not required under act of 1866 occurs in the case of Iron Silver Mining Co. vs. Elgin Co. (118 U. S. 186), in which case no such question was involved, as all locations therein mentioned were of date subsequent to May 10th, 1872.

When viewed in the light of subsequent decisions of this court, the reflection forces itself upon us that the court in passing upon the Eureka case placed main stress upon the matter of the agreement as to the compromise line through the Potts Chamber, and not upon as wise and thorough a view of the statute relative to the extra-lateral right as has been rendered necessary in subsequent cases where the absence of such compromise agreement or estoppel caused the requirements of the statute to be reasoned out, distinguished and applied.

This court has not, since the decision of the Eureka case, been called upon to decide the question presented for its decision in this cause, but in the twenty years since that decision, many cases involving cognate questions have been decided here, establishing such principles relative to the extra-lateral right, as are irreconcilable with the theory that the right is to be exercised within planes drawn at right angles to the general course of the vein at its end points, and irrespective of the direction of the end lines of the location.

The Flagstaff case (98 U. S. 463) construed a patent issued under the law of 1866, and compared that law with that of 1872, using this language:

> "The language of the Act of 1866, 14 Stat. at L., 251, in relation to 'a vein or lode' is, 'That no location hereafter made shall exceed two hundred feet in length *along the*

*vein* for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein *to any depth*, with *all its dips, variations and angles*, together with a reasonable quantity of surface for the convenient working of the same as fixed by the local rules,' etc. The Act of 1872, 17 Stat. at L. 91, is more explicit in its terms; but the intent is undoubtedly the same, as it respects end lines and side lines, and the right to follow the dip outside of the latter."

* * * * * * * * * * * * * * *

"As the law stands, we think that the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, which lines are those which are crosswise of the general course of the vein on the surface."

In King vs. Army Com. M. Co. (152 U. S. 227-8), reversing the Supreme Court of Montana, this court says:

"It is evident from the provisions cited (U. S. R. S. Sec. 2324) that the *location as made and defined* must control not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights."

* * * * * * * * * * * * * * *

"The Court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights as his imperfect location warrants, under the statute. It cannot relocate his claim and make new side lines or end lines."

In Iron Silver M. Co. vs. Elgin M. & S. Co., 118 U. S. 196, it is held:

"The provision of the statute, that the locator is entitled throughout their entire depth to all the veins, lodes or ledges the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips, yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins if they are not identical.

* * * * * * * * * * * * * * *

"If it is expedient to change the rule, legislative action should be invoked, as it would operate only in the future, and not judicial decision which would affect past cases as well.

"This view of the controlling effect of the end lines of the surface location is also sustained by the decision of this court in the Flagstaff Case, Mining Co. v. Tarbet, 98 U. S. 463, (Bk. 25, L. ed. 253)."

In Del Monte M. & M. Co. vs. Last Chance M. & M. Co., 171 U. S. 87, after a review of these cases this court says that they settle the proposition,

"That the lines of the location as made by the locator, are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location."

The last case decided of which we have report touching the question of extra-lateral right is that of Walrath vs. Champion Co., 171 U. S. 293, in which the court was called upon to construe a patent issued Apr. 28th, 1871, upon a location made under the law of 1866.

In this case the *patented area* of the Providence location presented a northerly end line having two planes, that is a broken or elbowed line, thus, "f g h" f—g—g—h. The southerly end line was parallel to the line g—h, and hence not parallel with f—g. The Providence vein, upon which the location was made passed across the line g—h, and the "Contact" vein in dispute passes across the line f—g.

The question was which of these lines constituted the direction of the plane by which to control the right to follow the "Contact" vein on the dip.

The court says:

"The extent of the right passing under the act of 1866 has been decided by this court,"

and proceeds to quote in support of the statement, the doctrines of the Flagstaff case as herein given, and adds:

"And after stating that the act of 1872 was more explicit than the act of 1866, but the intent of both undoubtedly the same, as it respects lines and side lines, and the right to follow the dip outside of the latter, etc."

After further quoting the Flagstaff opinion, the court says:

> "This law was followed and applied in Argentine Co. vs. Terrible M. & M. Co., 122 U. S. 478; and in Iron Silver M. Co. vs. Elgin Min. & S. Co., 118 U. S. 176; King vs. Army & Silversmith Con. Min. Co., 152 U. S.
>
> "The locations passed upon in these cases were made under the act of 1872, *but we have seen* that the intent of that act and the act of 1866, 'as it respects end lines and side lines' was the same."

The court proceeds to quote approvingly from the opinion in the Del Monte case, as follows:

> "First, the location as made on the surface by the locator determines the extent of rights below the surface."

Finally, Mr. Justice McKenna, in the opinion in the Walrath vs. Champion case says:

> "*It may be* that the end lines need not be parallel under the act of 1866; may converge or diverge, and may even do so as to new veins, *of which however we express no opinion*, but they must be straight,—no other define planes which can be continuous in their own direction within the meaning of the statute."

This language indicates very plainly that this court did not wish to hold that the decision in the Eureka case, or the casual assertion in the Elgin case, foreclosed the question of necessary parallelism of end lines to warrant the exercise of the lateral right in locations made under the act of 1866. Surely the Court would not have cautiously used the expression "*of which we express no opinion*," if the doctrine had been by it considered settled or foreclosed, as is claimed by defendant in error.

From these principles, we deduce the conclusions:

1. The ownership as to length upon the course or strike of a vein, both on the surface and beneath the surface is limited by the *surface lines* of the location.

2. That the "outside parts" of such vein beneath the surface to which the extra-lateral right attaches cannot *exceed such length so fixed by the surface lines.*

3. That the end line planes, to justify a claim of extra-lateral right must not be divergent, in the direction of the dip of the vein.

4. That where the end line planes are divergent in the direction of the dip of the vein, no extra-lateral right exists.

WHEREFORE, Plaintiff in Error insists that both the motion to dismiss the writ of error herein, and the motion to affirm the judgment of the Supreme Court of the State of California, ought to be denied.

Respectfully submitted,

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